

State of Colorado



Bill Owens
Governor

John Zakhem
Board Chair

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Board Director

State Personnel Board
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AGENDA PUBLIC BOARD MEETING August 15, 2006

A public meeting of the State Personnel Board will be held on Tuesday, August 15, 2006, at the Colorado Department of Transportation, 202 Centennial Street, Glenwood Springs, Colorado 81601. The public meeting will commence at 10:00 a.m.

Those persons who wish to attend the meeting in Denver may come to the Colorado State Personnel Board at 633 17th Street, Suite 1400, Courtroom 1, Denver, Colorado 80202-3604, at 10:00 a.m. to attend the meeting via teleconferencing.

Reasonable accommodation will be provided **upon request** for persons with disabilities. If you are a person with a disability who requires an accommodation to participate in this meeting, please notify Board staff at 303-866-3300 by August 10, 2006.

I. REQUESTS FOR RESIDENCY WAIVERS

A. August 1, 2006 Report on Residency Waivers

Reports are informational only; no action is required.

II. PENDING MATTERS

A. Pending Motions

1. William Thomas Little v. Department of Corrections. State Personnel Board case number 2006B013.

Complainant, a correctional officer, appealed Respondent's rejection of his withdrawal of resignation, asserting that he was constructively discharged. After hearing, the ALJ found that the Negotiated Resignation into which Complainant had entered with Respondent was ambiguous, although Complainant did intend to resign when he signed the document; Respondent violated Board Rule 7-5B in rejecting Complainant's timely withdrawal of his resignation; Complainant did not knowingly and voluntarily forfeit his right to appeal his resignation; Complainant was, in fact, constructively discharged; Complainant is entitled to a hearing to challenge the basis for his termination; and Complainant is not entitled to an award of attorney fees and costs. In her decision, the ALJ ordered that Respondent accept Complainant's withdrawal of resignation, and that the termination letter issued to Complainant be given full force and effect, both retroactive to August 5, 2005.

On June 8, 2006, Respondent filed its Notice of Appeal of the Initial Decision of the Administrative Law Judge. On June 15, 2006, Complainant filed Complainant's Motion to Dismiss or Strike Respondent's Notice of Appeal of the Decision of the Administrative Law Judge. On June 21, 2006, Respondent filed a Response to Complainant's Motion to Dismiss or Strike Respondent's Notice of Appeal of the Decision of the Administrative Law Judge.

*Only Complainant's Motion to Dismiss or Strike Respondent's Notice of Appeal of the Decision of the Administrative Law Judge and Respondent's Response to Complainant's Motion to Dismiss or Strike Respondent's Notice of Appeal of the Decision of the Administrative Law Judge are before the Board this month. The appeal of the Initial Decision of the Administrative Law Judge is scheduled for consideration by the Board at the September 19, 2006 Board meeting.

III. REVIEW OF INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR ON APPEAL TO THE STATE PERSONNEL BOARD

A. John K. Williams v. Regents of the University of Colorado, University of Colorado System Office, Procurement Services Center, State Personnel Board case number 2005B081.

Complainant, a purchasing agent, appealed his disciplinary termination, seeking reinstatement, back pay, benefits, and attorney fees and costs. After hearing, the ALJ concluded that Complainant committed most of the acts for which he was disciplined, including providing poor customer service with respect to the tote bag requisition, the Veritas Software requisition, and the Bear Creek Recreation Center sound system requisition. In addition, the ALJ found that Complainant was deliberately insubordinate in his actions of speaking to a co-worker for ten minutes immediately after he was told to limit conversations with that co-worker and that he was late to work, despite an agreement he entered into regarding the issue of timeliness. In affirming Respondent's disciplinary termination of Complainant, the ALJ concluded that Respondent's action was not arbitrary, capricious, or contrary to rule or law; the discipline imposed was within the range of reasonable alternatives; and attorney fees are not warranted.

On March 15, 2006, the ALJ issued the Initial Decision of the Administrative Law Judge. Complainant filed his Notice of Appeal on April 3, 2006. A Supplemental Certificate of Record of Administrative Proceedings Before the State Personnel Board was issued on June 19, 2006. Complainant filed his Opening Brief on June 29, 2006. On July 17, 2006, Respondent filed University's Response Brief. On July 31, 2006, Complainant's Reply Brief was filed.

B. David Teigen v. Department of Corrections, Colorado Territorial Correctional Facility, State Personnel Board case number 2003B127.

Following an evidentiary hearing, the ALJ ordered that Respondent pay Complainant's reasonable attorney fees and costs in the amount of \$79,741.12, plus interest.

On April 7, 2006, the ALJ issued the Order Awarding Attorney Fees and Costs. Respondent filed its Designation of Record on April 20, 2006. On May 5, 2006, Complainant filed his Notice of Appeal of the ALJ's Order Awarding Attorney Fees and Costs. Respondent filed its Opening Brief on Appeal from the Order Awarding Attorney Fees and Costs on July 10, 2006. After the Director denied Complainant's request to file a 23-page response brief, on August 3, 2006, Complainant filed Complainant's Resubmitted Response Brief on Administrative Law Judge's Award, and Respondent filed Respondent's Reply Brief.

IV. REVIEW OF PRELIMINARY RECOMMENDATIONS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR TO GRANT OR DENY PETITIONS FOR HEARING

- A. Matthew P. Valdez v. Department of Human Services, Division of Youth Corrections, Platte Valley Youth Service Center, State Personnel Board case number 2005B069.

Complainant was a probationary employee who was terminated from employment from the Department of Human Services, Division of Youth Corrections, Platte Valley Youth Service Center. On December 29, 2004, Complainant filed a petition for hearing, asking the Board to review his discrimination claim based on race (Hispanic).

Respondent argues that Complainant was terminated for unsatisfactory performance and not as a result of racial discrimination.

On July 17, 2006, the Administrative Law Judge issued a Preliminary Recommendation recommending that Complainant's petition for hearing be denied.

- B. Carol Denogean v. Department of Human Services, Pueblo Regional Center, Community Living for Developmentally Disabled, State Personnel Board case number 2006G063.

Complainant a probationary employee at the time of termination from the Department of Human Services, Pueblo Regional Center, claims that Respondent terminated her because she filed a Workers Compensation claim and because she raised issues of resident care to her appointing authority.

Respondent counters that the only reason Complainant was terminated was due to performance issues, which are not reviewable by the Board, and that Complainant has failed to establish a *prima facie* case of disability discrimination.

On July 26, 2006, the Administrative Law Judge issued a Preliminary Recommendation recommending that Complainant's petition for hearing be denied.

V. INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR

- A. Stephen Bullock v. Department of Human Services, State Personnel Board case number 2005B010 (July 20, 2006).

Complainant, a General Professional III, appealed his disciplinary termination, seeking reinstatement. After hearing, the ALJ determined that Complainant committed all of the acts for which he was disciplined, including willfully violating his supervisors' directives, engaging in a pattern of insubordination toward his supervisors, and violating the agency's workplace violence policy. Affirming the disciplinary termination, the ALJ concluded that Respondent's disciplinary action was not arbitrary, capricious or contrary to rule or law, and the discipline imposed was within the range of reasonable alternatives. In addition, the ALJ determined that Respondent did not discriminate against Complainant and did not violate the Colorado State Employee Protection Act, as Complainant's statements do not constitute protected disclosures under the Act, because they do not relate to an abuse of authority or mismanagement of the state agency.

- B. Patrick Ward v. Department of Natural Resources, State Personnel Board case number 2004B143 (July 20, 2006).

Following Board review of the Initial Decision of the Administrative Law Judge, the Board remanded this case to the ALJ "solely for legal analysis regarding the fifth prong of the test for a *prima facie* case of discrimination based on a disability, as enunciated in

Community Hospital v. Fail, 969 P.2d 667 (Colo. 1998)." On remand, the ALJ made additional findings, including the fact that the preponderance of evidence demonstrates that despite Complainant's request for reasonable accommodation by transfer to a vacant position, Respondent continued to seek applicants other than Complainant, for any and all vacant positions for which he was qualified. The ALJ determined that the agency had a policy requiring it to conduct the vacant job search, the employee requested transfer to a vacant position, the agency failed to conduct that job search in violation of its own policy, and the agency failed to consider that employee for any and all vacant positions that came open. Contrary to Respondent's argument, the ALJ reasoned that to require Complainant to perform a vacant job search, excusing Respondent from compliance with his own policy, in order to meet his *prima facie* case, would shift the burden of proving the affirmative defense of undue hardship away from Respondent and onto Complainant. Finally, the ALJ concluded that, despite Complainant's request for transfer to a vacant position, Respondent, in violation of its own policy, failed to consider Complainant as a candidate for any and all vacant positions in the 1500-employee statewide agency, for a period of over five months. The ALJ thus found that Complainant met the fifth prong of the *prima facie* case for a failure to accommodate claim under *Fail*.

VI. REVIEW OF THE MINUTES FROM THE JUNE 20 AND JULY 18, 2006 PUBLIC MEETINGS OF THE STATE PERSONNEL BOARD

VII. ACKNOWLEDGMENTS

DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS JULY 18, 2006 PUBLIC MEETING:

- A. Jeanette Aragon v. Department of Corrections, San Carlos Correctional Facility, State Personnel Board case number 2003B223.

The Board voted to remand this matter to the Administrative Law Judge for a hearing on Complainant's claim for attorney fees and costs, in compliance with the Mandate of the Court of Appeals. The Board ordered that, in compliance with the Mandate from the Court of Appeals, the October 19, 2004 Order Denying Motions for Attorney Fees and Costs, Vacating June 1, 2004 Hearing, and Dismissing Appeal of the Administrative Law Judge is affirmed, to the extent to which it denies Complainant's request for an entry of judgment.

- B. Kimberly E. Temple v. Department of Revenue, Division of Gaming, State Personnel Board case number 2006G059.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing. In addition to the grounds set forth in the denial of a hearing in the Preliminary Recommendation of the ALJ, the Board also finds that it lacks jurisdiction over Complainant's claim of defamation.

VIII. REPORT OF THE STATE PERSONNEL DIRECTOR

IX. ADMINISTRATIVE MATTERS & COMMENTS

A. ADMINISTRATIVE MATTERS

- End of FY06 Budget Report and detailed Operating Expense Report
- Cases on Appeal to the Board and to Appellate Courts
- Web Site Statistics: April 2006 - 61,694; May 2006 - 75,594; June 2006 - 96,933
- Order Affirmed in Barron v. Department of Labor and Employment, Office of Field Operations, State Personnel Board case No. 2004B088, Court of Appeals No. 05CA0021

- Mandate/Order Affirmed in Cookson v. Department of Transportation, State Personnel Board case No. 2003G139, Court of Appeals No. 05CA1031

B. OTHER BOARD BUSINESS

- Staff Activities

C. GENERAL COMMENTS FROM ATTORNEYS, EMPLOYEE ORGANIZATIONS, PERSONNEL ADMINISTRATORS, AND THE PUBLIC

X. PROPOSED LEGISLATION AND/OR RULEMAKING

RULEMAKING

The Board's Notice of Rulemaking was issued on June 16, 2006, and published in the Colorado Register on July 10, 2006. An Amended Notice of Rulemaking was issued on July 19, 2006, to change the time of the rulemaking hearing from 9:00 a.m. to 10:00 a.m. The proposed rules and the proposed statement of basis and purpose have been available for review at the Board office as well as on the Internet since July 21, 2006. Testimony and comments regarding proposed amendments to the Board Rules will be taken at this meeting. The public testimony and comment portion of the rulemaking hearing is open. The purpose of the Rulemaking proposed for August 15, 2006, is to adopt amendments to Board Rule 4-28 to comply with the recent decision from the Colorado Court of Appeals in *Denise Martinez v. Department of Personnel and Administration*, State Personnel Board case number 2003B118, Court of Appeals number 04CA1174. This rule is proposed for the general clarification for the public and efficient management of the Board.

XI. EXECUTIVE SESSION

- A. Case Status Report
- B. Minutes of the June 20, 2006 Executive Session
- C. Other Business

XII. WORKING SESSION

- Discussion of proposals for Business Plan

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NEXT REGULARLY SCHEDULED BOARD MEETINGS - 9:00 a.m.

September 19, 2006	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
October 17, 2006	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
November 21, 2006	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
December 19, 2006	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
January 16, 2007	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
February 20, 2007	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
March 20, 2007	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
April 17, 2007	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
May 15, 2007	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
June 19, 2007	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604